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Social Protectionism and the First Amendment: How Regulation Hinders Rather than Helps Speech

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I. Introduction

The free speech clause of the First Amendment, despite the almost divine aura with which it is viewed, contains fundamental tensions. The express denial of Congress’s ability to curtail speech bestows an absolute right upon American citizens. Yet, not everyone chooses to or is capable of exercising this right to the same degree. The natural aristocracy of which the Founders spoke applies as much to eloquence and poignancy in spoken and written word as to other talents. Perhaps more problematic, however, are the very tangible constraints of the national press. Not only do media organizations have an interest in their continued existence, which has various implications relating to profit motives and editorial choices, but the basic infrastructure of data and information has limitations that put news and opinion in competition with each other. Often, this results in the shutting out of the disenfranchised and oppressed, those who do not have the resources to make themselves heard but who have the most exigent need to access the public forum and broadcast the threats they face. There has always been a regulatory impulse directed towards protecting this element of society. Often this is couched in terms of “fairness” and “equitability.” The government, after all, has an interest in the national welfare. Is this served when large sects of the population are impeded by barriers in institutions whose mission is to serve the public interest? Those who support initiatives like campaign finance reform or Net Neutrality would certainly argue not and point to the necessity of these types of regulations in maintaining a truly open democratic society. But is this kind of social protectionism truly egalitarian, or does it pick and choose interests to protect, thus turning the law into a tool of activism and exacerbating rather than aiding neutrality in public forums? The history of telecommunications regulation in the United States suggests the latter. Laws that aim to protect the integrity of speech in the public forum, because they rely on artificial constructs of “fairness,” inevitably do more harm than good to the state of freedom of expression.

II. The Rhetoric of “Fairness”

Before the merits of specific policies can be examined, the language in which laws seeking to promote social equilibrium are couched must be defined. Concepts like “fairness” and “neutrality” are actually somewhat abstract, a problem when they are the basis for regulations because ambiguity breeds discretionary latitude in which regulators can reasonably apply, or misapply, laws. Without careful definition and application, laws meant to protect the disenfranchised can become a threat to the livelihoods and rights of citizens.

In the West, rule of law has come to be synonymous with blindness—one standard of justice is applied equally to all citizens regardless of societal standing. But, this has not always been so, even in “enlightened” democratic thought. The Magna Carta, a cornerstone of civil liberties, which heavily influenced American government and Western philosophy instituted a tiered justice system.
Amercements, for instance, were handled differently depending upon whether the offender was a freeman, villein or member of the aristocracy.\(^1\) Though seemingly antithetical to the modern standard of American democracy, this standard, under a certain construct, is fair. A society founded on institutionalized hierarchy, as feudal 1215 England was, must necessarily have a bifurcated culture—elites come to expect a luxurious standard of living from which the lower classes, with their lack of resources, are precluded. When high amounts of disparity divide society, does one criminal code really serve justice? Logic dictates, no, in certain cases. Proportionally, an amercement assessed against a freeman is going to be more burdensome than on the vaster riches a baron or earl possesses.

In terms of speech, a broadcast license is more of a barrier to access for an independent radio host than for the local affiliate of a national media conglomerate. In this way, a law, duly enacted by officials who hold the trust their constituents placed in them as sacred and earnestly try to protect those interests, may become an impediment rather than a tool. The logical alternative is to craft regulation that is absolute in deciding what constitutes an offense and relative in meting out punishments that are narrowly tailored to a situation. When the Federal Communications Commission asked the public for its views on “how to devise a rigorous multi-factor “screen” to analyze whether any conduct hurts consumers, competition, free expression and civic engagement, and other criteria under a legal standard termed ‘commercial reasonableness,’”\(^2\) this is doubtless the standard they had in mind.

The same principle underlies McCain-Feingold provisions that target big money actors whose ample resources give them the ability to have a louder voice in the electoral dialogue. Under the law, disclosure requirements for individuals making independent expenditures differ based on amount. Within 24-hours of making or committing to make an expenditure of an aggregate $1,000, an individual must report that spending to the Federal Election Commission. Those whose aggregate expenditures amount to or exceed $10,000, however, have 48-hours to do the same.\(^3\) In this way, while citizens are all equally answerable to the same regulations, provisions are crafted to affect different entities in different ways. Essentially, this is a “zero sum game” strain of egalitarianism. Legislation

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is written to fit a predetermined end and societal actors, like pieces on a chessboard, are divided into groups and governed by specific rules based upon how they might impact that outcome. Each piece is equally important and necessary to the game, but their different functions dictate their behaviors.

However, the merits of this kind of egalitarianism are not tautological. Real world parties do not exist in a vacuum. A majority or plurality—the basis for the crafting of public policy in a democracy—is predicated on a non-equal distribution of ideological leanings amongst a populace. Zero sum egalitarianism presumes that society is at stasis and actions by minority actors can assume too much power and threaten equilibrium. Regulatory laws begin to be weapons, curtailing action—usually the speech rights they seek to protect—on a basis that discriminates against specific action. Taken to an extreme, the government becomes a gatekeeper, unassailable in its power and its judgment on what is dangerous. Couple this with narrowly tailored laws that target specific types of action and social protectionism morphs into the worst form of despotism—a righteous one.

Besides, when power flows from the bottom, as it does in a democratic society, a teleological approach to governance must be taken. The body of the federal government may be governed by the functions of its organs, but the constitution of those organs hinges on the behavior of individuals at local levels. A circuitous pattern in logic begins to emerge. This is illustrated in an amendment proposed by New Mexico Senator Tom Udall. In the wake of the Supreme Court’s decision in Citizens United v. Federal Election Commission, Udall, among others, felt the Court’s decision in repealing regulatory oversights mandated by McCain-Feingold left open the possibility for outside money to influence local elections and abrogate the power of small voices. To combat this, Udall proposed a Constitutional amendment that aims to “advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes,” and grants Congress power to regulate the amount that may be spent for or against a federal candidate. A similar provision is made for states. Clearly, this falls under the realm of social protectionism as it cites “political equality” as an impetus. But does it assume too much power? Certainly, it is ridiculous to think that Congress would codify in the Constitution a devolvement of power to states over their internal affairs when the Ninth and Tenth Amendments already make this a matter of their prerogative.

6 Sec. 2 http://www.scribd.com/doc/148408191/Udall-Constitutional-Amendment-on-Campaign-Finance
since electoral oversight is not part of the enumerated power granted to the federal
government. But another question, related to the circuitry of Congress acting to
secure power it only has because of the electoral endorsement of a popular
majority, springs to mind: who decides fairness? Is not a vote a determination of
preference, a form of speech? This is the sort of absolute power wielded by the
people. Can it be imposed on them by a government which draws its power from
voter discretion? Again, society is teleological, totally dependent upon the degree
to which individuals choose to participate in its various areas. Hence why
individual rights, not societal interests, are the basis of the American system. This
distinction in scope cannot be made too much of because it factors into the failure
of protectionist laws to shield speech. Ultimately, one group is protected at the
expense of another.

III. Speech and Parity in Practice: Past Regulatory Efforts

Though individuals might be the root of societal actions, majorities must
be the basis of consensus, even though this excludes some voices, otherwise
nothing would ever be achieved. This is where the “public interest” comes into
play. Here, the government has a compelling interest in not just protecting the
equal weight given to speech in societally exigent events, the justification for
campaign finance laws, but in overseeing the actual content of speech. In the past,
this has taken the form of the Fairness Doctrine, an FCC policy that argued
broadcast media were subject to regulatory oversight because they existed on
media spectrum that were public utilities. Therefore, “station licensees were
“public trustees,” and as such had an obligation to afford reasonable opportunity
for discussion of contrasting points of view on controversial issues of public
importance. 7 “Controversial,” of course, is an eminently subjective term, making
it a poor basis for regulation. Unsurprisingly, the amount of discretion allowed by
the ambiguous language led to abuse of a measure that was meant to protect
speech and the First Amendment. Often, the party with political control in
Washington used it as an excuse to censor opposition. Under Eisenhower, the
FCC granted a majority of licenses to Republican-aligned broadcast television
station owners; Franklin D. Roosevelt’s aversion to a press he perceived as hostile
to New Deal programs is well known, and as a result, he forbade newspaper
publishers from owning radio stations. 8 Thus, the primary motivation behind
many of the FCC’s decisions to grant licensure was a calculated bid to mold the
press into an organ that buoyed the dominant political party, curtailing the

(1989): 105, accessed February 27, 2015,
editorial discretion of independent media organizations, an action antithetical to the protectionist, egalitarian impetus behind the policy.

In 1987 the FCC abandoned the Fairness Doctrine precisely because it had this effect, but offered in its defense: “We believe that the role of the electronic press in our society is the same as that of the printed press. Both are sources of information and viewpoint. Accordingly, the reasons for proscribing government intrusion into the editorial discretion of print journalists provide the same basis for proscribing such interference into the editorial discretion of broadcast journalists.”9 This begs the question: does the government have the ability to regulate the editorial discretion of the press? Historically, the protection afforded to the American press against government meddling is an aberration. As new forms of media have evolved across the epochs, the novelty of modes of communications like the printing press have posed exigent questions to the societies in which they arose just as the rise of radio, television and the Internet have posed to modernity. For instance, to English thinking, the printing press merited special regulation: “the damage that might more readily ensue, and the uncontrolled power that printing presses could confer upon their private owners, were not seen as good reasons for loosening the constraints of common law.”10

The novelty of any new industry presents dual threats to the standing societal order: it threatens to break whatever hold government has over a sector of society and, since it changes the way in which affairs are conducted, it promises tumult. It is therefore easy for government to mount a campaign that advocates for regulatory oversight “in the public good.” This is precisely what happened with Net Neutrality.

Though public backlash against government censorship can be seen throughout history, the Court of the Star Chamber and licensing being a primary example with direct influence on early American attitudes towards speech, precedent for editorial discretion being protected by law doesn’t really become a matter of public interest until the trial of John Peter Zenger in colonial New York in 1735. As editor of the New York Weekly Journal, Zenger aroused the ire of William Cosby, the royal governor, by printing material that criticized his actions. The trial became less about the facts and more about ideals—could the truth be libelous? In short, the now-assumed right of editorial discretion was a matter of serious contention. Zenger, represented by a young Alexander Hamilton, was found not guilty and the importance of individual voices in society was

transformed. Expression of political ideology amidst the populace, rather than just by the elites, began to be an important part of American culture and “because of the Journal’s popularity, a whole section of people received a constant diet of critical journalism that showed them how influential their approval or disapproval was.”\(^{11}\) In the context of the Digital Age, where opinion is so prevalent in journalism it often seems cacophony of shrill voices, this seems like a ridiculous distinction, but there is a stark difference in attitude between then and now.

During the trial, Hamilton stated:

> But when a ruler of a people brings his personal failing, but much more his vices, into his administration, and the people find themselves affected by them either in their liberties or properties, that will alter the case mightily; and all the things that are said in favor of rulers and dignitaries, and upon the side of power, will not be able to stop the people’s mouths when they feel themselves oppressed.\(^{12}\)

For this comment, which would be mundane against many of the statements made today against the sitting president, he was chided by the prosecuting attorney and forced to clarify that he meant no criticism of the king.

The Zenger trial was important because it emphasized the voices of those who were outside the power structure. With the passage of the Bill of Rights, the idea that prominent societal actors were of no more or less value than those who by circumstance did not have the same resources, became a fundamental plank of American society. But this has since been turned on its head. Entities comprised of more than one person are in danger of losing their rights because a strict reading of the First Amendment claims only individuals are protected by it. When Supreme Court Chief Justice John Roberts authored a concurring opinion in the *Citizens United* ruling, he cited the concern that “First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is the foundation of our democracy,”\(^{13}\) in his support for striking down provisions in McCain-Feingold that restricted the ability of corporations and labor unions to participate in elections. Of course, there is little Constitutional basis for such an interpretation, though, ever since the Tillman Act in 1907, campaign finance law that seeks to regulate, if not outright ban, corporate speech has existed.

The presence of oligarchy in media is an understandable concern for laws that seek to insure individual voices aren’t lost in corporate morass, but the issue here, again, is the proper scope in which protectionist regulation is based and the


\(^{12}\) IBID, 115.

way society is viewed. Media, even the news, has a profit motive and this can lead to moneyed individuals exerting their influence in localities far from where they live: Bill de Blasio’s “Mayors Against Illegal Guns” PAC or Karl Rove’s “Crossroads GPS” PAC. But all the money in the world thrown at an idea or proposed law is not necessarily coercive. At some level, individuals must be responsible for filtering what information they take in from what sources and deem credible. No government power on Earth could possibly replace this function. As to the scope of society, the ways this term can be defined at local, state and federal levels are myriad. In the wake of the abandonment of the Fairness Doctrine, talk radio, particularly on the right, exploded. Stations broadcasting a talk show format went from approximately 400 in 1990 to 1,400 in 2006. In 1984, a little known in-market talk host named Rush Limbaugh stepped onto the national stage. Twenty-six years later, he is secure as the most listened to host in America. There can be no question about the bombastic nature of the overtly opinionated show. Yet, a plurality of Americans inclined to listen to talk radio are drawn to Limbaugh. He could not have gained national notoriety without arousing the interest of people across the nation. And, while Limbaugh is an individual, his show is syndicated—he could not be heard nationwide without a corporate structure. The same could be said for any media personality for whom there is public demand. Whether they are a cable news anchor, radio host or write a blog on the Internet, corporations are necessary for mass distribution of content. The Fairness Doctrine claimed to protect the egalitarianism of speech and the integrity of editorialization against the limited resources of telecommunications platforms, but the explosion of talk radio in the wake of its repeal challenges this assertion.

For all the claims of protectionism, past regulatory forays into the sphere of public debate have ultimately failed. Though initiatives like the Fairness Doctrine and various iterations of campaign finance law seek to protect the fragility of the public sphere, they ultimately crush those voices for which they claim to be advocates. There is no real parity in society because no one definition of it exists; communities of varying types come into being for different purposes across a diverse set of sovereign states. Even if one concrete definition could somehow be set down, the ways in which people make decisions, rooted in an incalculable number of variables, are as impossible to predict as the future of political conditions. Protectionism relies on the preservation of a specific set of circumstances. But society is constantly evolving; the exponential speed and scope of telecommunications platforms is proof enough of this. Give a regulatory agency power and it now has a quite natural self-preservation instinct: it will look to protect itself at some point, thus warping its original scope. The abuse of

protectionist regulations for the purposes of self-betterment are numerous. Ultimately, based on the evidence of past efforts by American government, the social good and the rights of the disenfranchised few are those most hurt by regulation designed to provide succor.

IV. Net Neutrality: The Future of Social Protectionism

All of these ills and abuses are all too evident in the government’s latest efforts to protect the “neutrality” of the 21st century public square. Like every medium that has come before, the ability of voices to be heard on the Internet recently became a concern for federal regulators. A cadre of voices, including Commissioner Tom Wheeler of the FCC, led a cadre of voices who wanted to protect the “rights of internet users to go where they want, when they want, and the rights of innovators to introduce new products without asking anyone’s permission.”15 As with its regulatory progenitor, Net Neutrality was couched in egalitarian terms that took aim at supposed throttling, blocking and prioritization of web pages by Internet service providers (ISPs.) President Obama, who tasked the FCC with adopting the measure, stated the legislation was necessary because “We cannot allow Internet service providers (ISPs) to restrict the best access or to pick winners and losers in the online marketplace for services and ideas.”16 And on February 26, the FCC voted 3-2 to do so.

But what is Net Neutrality specifically? The answer is not clear. A 317-page plan exists, but it has not yet been made publically available. However, the FCC has claimed its ability to regulate the Internet comes from a re-interpretation of Title II of the 1934 Telecommunications Act, which relies on the Commerce Clause in Article 1, Section 8 of the Constitution to regulate interstate communication by wire or radio. Obviously, the Internet did not exist in 1934 when the act was written, but one section of Title II states:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.17

Given the protectionist language in which the calls for the passage of the regulation were passed, it seems logical that this may in part be the basis of Net Neutrality. Not all members of the FCC were in favor of the initiative, however. In fact, the vote came down on straight party lines, with Democrat-appointees supporting and Republican-appointees opposing the measure. In an op-ed for The Hill, Commissioner Michael O’Reilly expressed concerned with the vagueness of the language surrounding advocacy for the broad, all-encompassing resolution. The almost limitless powers assumed by a catalyst of “equality,” he reasoned, were a threat because they could conceivably encompass almost any measure touted in the guise of “fairness.” He writes, “Regulatory creep usually starts with calls for “regulatory parity.” The mantra will be, if you are going to impose certain regulations, then it is only fair to stick it to all market participants equally.”18 The potentially chilling effects this will have on speech across-the-board are immense. An end to prioritization, for instance, means that ISPs will no longer be able to ensure that the most popular news cites receive more bandwidth if traffic demands this be done in order for pages to load quickly.

Like past protectionist efforts, Net Neutrality only undermines the ability of consumers to express their preferences. It bears repeating that society does not exist at parity; various beliefs are more numerous than others. Services will be deemed more meritorious based on the quality and content of their products. Leaving the public sphere open allows a natural hierarchy to evolve, one that’s rooted in a preference expressed by a plurality of people. This idea underlies the speech and freedoms of the First Amendment. Speech is much more than actual words. It is the choice individuals make at the voting booth, the products they buy and the media they choose to consume. When protectionism regulates speech it constricts the available choices, essentially leaving the individual with a degraded set of options. Choice can be overwhelming, misleading even, but without knowing all the facts of a situation, an individual cannot possibly make an informed decision. Regulation does not help to inform consumers, nor does it protect them from the despotism of unscrupulous media or corporations, but robs people of the ability to decide for themselves whether they ought to be concerned by the behavior of a particular media organization. As Thomas Jefferson so wisely noted in his Second Inaugural Address, “the press, confined to truth, needs no other legal restraint; the public judgment will correct false reasoning and opinions, on a full hearing of all parties; and no other definite line can be drawn

between the inestimable liberty of the press and its demoralizing licentiousness.”

Works Cited


